IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1971
No. 71-1465

J. B. ROSENTHAL,

Petitioner,

vs.

ARKANSAS LOUISIANA FINANCE CORPORATION,

Respondent.

PETITION FOR REHEARING OF DENIAL OF PETITION FOR CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

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In Propria Persona, Petitioner

TOPICAL INDEX

		Page
Table of Authorities		ii
OPINIONS BELOW		1
QUESTION PRESENTED BY PETITION FOR REHEARING		2
STATEMENT		3
ARGUMENT, GROUNDS FOR PETITION FOR REHEARING		3
A	WAS THE ATTORNEY-CLIENT AGENCY RELATIONSHIP EVER CREATED?	7
B	ASSUMING THE EXISTENCE OF THE ATTORNEY-CLIENT RELATIONSHIP, UNDER WHAT CIRCUMSTANCES MAY AN ATTORNEY SURRENDER HIS CLIENT'S FUNDAMENTAL RIGHTS?	10

TABLE OF AUTHORITIES

Cases	Page
Gagnon v. Nevada Desert Inn, 45 Cal. 2d 448	10
Price v. McComisk, 22 Cal. App. 2d 92	10
Constitution	
United States Constitution, Fourteenth Amendment	2, 4, 6
Rule	
Supreme Court Rules, Rule 58	1
Textbook	
Restatement of Agency 2d, §15(a)	8

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OPINIONS BELOW

The opinions below are set forth in the Petition for Certiorari at page 2 thereof.

This Honorable Court denied Petitioner's Petition for Certiorari December 1, 1972. This Petition for Rehearing is brought within twenty-five days thereafter pursuant to Rule 58, Supreme

Court Rules, for the reason that substantial grounds available in support of the Petition for Certiorari, were not included in the Questions Presented by the Petition for Certiorari.

QUESTION PRESENTED BY PETITION FOR REHEARING

Is the due process clause of the Fourteenth Amendment violated:

- where the defendant, by his own acts, has not clearly, overtly or intentionally authorized an attorney to appear on the defendant's behalf

- where that attorney, who merely "assumes" he has authority from defendant, files a noticed motion purportedly on behalf of the defendant

- where the courts assume or imply authorization, and

- where a judgment by default (against defendant's substantial and fundamental rights), for failing to file answer, issues personally against such defendant, despite the fact that such defendant had not even any of the so-called "minimum contacts" with the forum jurisdiction?

STATEMENT

The facts of the case are set forth in specific detail in the Petition for Certiorari at page 5, et seq., thereof. These relevant pages of the Petition for Certiorari are also, for convenience annexed hereto as Appendix A.

ARGUMENT, GROUNDS FOR PETITION FOR REHEARING

I

Although, at first glance it might appear otherwise, the issues presented by this case do not merely involve an isolated injustice to your Petitioner. The due process clause of the Fourteenth Amendment requires that the rights of no man be sacrificed at the altar of mere judicial administrative convenience. An efficient system of justice must above all, be just, fair, careful, and must appear to be just, fair, and careful.

It is common knowledge that our courts are congested and burdened by the weight of heavy case loads. As a result, the default judgment procedure has taken on increased importance. It is one means of alleviating this congestion in the courts, by efficiently resolving uncontested matters. Nevertheless, the courts must assume the special responsibility

of assuring each party litigant that he may rely on the fact that the default procedure is just.

In order to comport with due process the default judgment procedure must satisfy two fundamental requirements. Firstly, the court purporting to issue a default judgment must have personal jurisdiction over the defendant. Secondly, the judgment awarded cannot exceed or differ from the relief sought by the complaint and prayer.

Petitioner submits that in the instant case neither of these fundamental requisites were met.

In the name of judicial economy, courts have followed the principle that an attorney who purports to act as the representative of a particular client is presumed to be authorized by that client. While this principle sometimes serves to further the efficient administration of justice, in this default judgment context the presumption operated in a blantly unconstitutional fashion. Legal fictions while sometimes practical in effect can trample basic freedoms. Petitioner never authorized an attorney to represent him individually. Nor was Petitioner aware of the assertion of such personal jurisdiction until nearly a year after the default judgment was entered. Petitioner also never was personally served with Summons (Process). For that reason alone the due process clause of the Fourteenth Amendment was violated.

Secondly, where a party defaults, he has a constitutional right to rely on the demands of the complaint and prayer. The due process clause requires notice appropriate to the matter to be heard. In the absence of a clear manifestation of intentional consent by a client no one is authorized to sacrifice or give up that client's fundamental freedoms, rights, or property.

These principles have application to all men. All men have the right to due process of law. For the foregoing reasons, Petitioner respectfully submits that this Honorable Court should seize the opportunity to fully set forth the basic due process requirements which must be satisfied by the default judgment procedure. What may appear to be an isolated injustice to your Petitioner is in fact a serious erosion of fundamental freedoms. When one man can be unconstitutionally deprived of fundamental rights, who among us is free? Since the default judgment has assumed increasing importance in the administration of justice, it is respectfully submitted that this Honorable Court has an increased responsibility to guarantee that fundamental freedoms not be rendered assunder by the unconstitutional administration of such procedure.

II

An attorney cannot create the attorney-client relationship by his own "assumption" or "belief" that it exists, without a clear manifestation from the purported client. Even if,

arguendo, a party has engaged an attorney, the attorney cannot under a general authorization, surrender or destroy his client's fundamental or basic rights without explicit authority from, and a clear manifestation of, intentional consent by the client. Petitioner never intentionally authorized attorney McCann to file an appearance on petitioner's individual behalf or to consent to the entry of a default judgment against Petitioner, individually, in the Kentucky action.

The findings of the courts below (Kentucky Trial Court, California Trial Court and California Court of Appeals) that the Kentucky Court had personal jurisdiction over defendant individually, violate the due process clause of the Fourteenth Amendment.

Two issues are presented for consideration. First, by what means is the relationship of agency created, between a purported client (principal) and the agent (attorney)?

Second, assuming, arguendo, that the agency relationship has been created, can the attorney bind his absent and purported or "assumed" client in the giving up, surrendering, or losing of substantial, fundamental rights of the principal, the purported or "assumed" client, without his client's consent.

A

WAS THE ATTORNEY-CLIENT AGENCY RELATIONSHIP EVER CREATED?

The opinion of the California Court of Appeals stated that:

> "The creation of an agency does not depend upon the express appointment and acceptance thereof, but may be implied from the words and conduct of the parties and the circumstances of the particular case." (Petition for Certiorari, Appendix B, page 14.)

Petitioner has no quarrel with that general proposition or statement of law. But the rule thus stated should not be applied so as to overrule the well-established principle of agency law that an agency relation exists only if there has been a manifestation by the principal to the agent that the agent may act on his behalf.

The cases cited in the Opinion of the California Court of Appeals (Petition for Certiorari, Appendix B, page 14), in support of the foregoing quoted proposition, all contain, factually, the element of the principal's clear manifestation of intentional consent to the creation of the agency. That particular element is plainly not present in the instant

A

case!

> "A person is not an agent merely from the fact that he believes he had been authorized to act as agent for another, or purports to act as such." Restatement of Agency 2d, §15(a).

In the circumstances in the instant case, at very best, the only assumption in which the Kentucky attorney (McCann) engaged was the assumption that he represented all of the defendants collectively as partners of the partnerships. He never assumed that he represented the defendants either collectively (in their individual non-partnership capacities), or individually.

Attorney McCann's testimony (his deposition) was admitted in evidence at the trial, in the California Superior Court. When asked if he had been employed as attorney to represent petitioner, Mr. McCann replied:

> "I can't say that separately Mr. Rosenthal employed me as his personal attorney, but having represented all of them in their limited partnership, I assumed I was representing all of them at that time. . . . Whether I was technically employed as Mr. Rosenthal's personal attorney, I don't know that there was any conversation about that."

In fact and in truth, petitioner never authorized attorney McCann to represent him individually. The issue was never discussed with McCann. The only reason petitioner ever had any conversation with McCann in connection with the Kentucky action was a result of the fact that petitioner himself had served as attorney for the limited partnerships in California.

Moreover, in its Opinion, the Court of Appeals incorrectly states a material fact.

> "Before Plaintiff filed the Kentucky action, McCann had represented the limited partnerships and all of the partners in other matters." (Emphasis added.) (Petition for Certiorari, Appendix B, page 14.)

Thus by means of legal fictions, unconstitutionally unwarranted assumptions, and as a result of the above referenced material mistake of fact by the California Court of Appeals relating to McCann's prior representation of the limited partnerships not the partners as individuals, personal jurisdiction was asserted over petitioner individually.

B

ASSUMING THE EXISTENCE OF THE ATTORNEY-CLIENT RELATIONSHIP, UNDER WHAT CIRCUMSTANCES MAY AN ATTORNEY SURRENDER HIS CLIENT'S FUNDAMENTAL RIGHTS?

On the second question - related to the scope and nature of the authority that an agent-attorney has, assuming arguendo, that the existence of the agency is once established, there is clear and abundant authority that even in such circumstances, the attorney may not impair, surrender or destroy his client's substantive rights without his client's clear and explicit consent. Price v. McComisk, 22 Cal. App.2d 92 (1937). See, Gagnon v. Nevada Desert Inn, 45 Cal. 2d 448 (1955) to the effect that:

> "The implied general authority of an attorney does not include any power or authority to dispose of the client's substantive rights. . . . An attorney ordinarily does not have implied authority to do an act which will effect the surrender or loss of a client's substantial rights."

Significantly, in the instant case, the "assumption" by McCann that he had the right to represent Petitioner individually, when acted upon, would here surrender petitioner's substantial rights. This is obviously true for the

reason that the prayer of the Kentucky complaint specifically did not seek any personal judgment against your petitioner (Petition for Certiorari, Appendix F, pages 30-36, inclusive). Thus, based only upon his own "assumption" McCann, by filing a Motion deemed an appearance, could be construed to have thus adversely affected Petitioner's substantial rights, and surrender them - in particular the right to remain free of any personam jurisdiction and of alternate personal judgment of the Kentucky Court.

Free nations assure that no man may be deprived of life, liberty or property without due process of law. Your Petitioner, respectfully submits that more than an individual injustice is presented by the instant case. Default judgments must satisfy the fundamental requirements of due process of law. This Court should seize this opportunity to remedy not only an injustice to Petitioner but to all who are deprived a fundamental rights by means of unconstitutionally unwarranted presumptions and legal fictions such as those presented by this case.

Wherefore, Petitioner prays that the instant Petition be granted.

Respectfully submitted,

JEROME B. ROSENTHAL

In Propria Persona, Petitioner

APPENDIX A

STATEMENT OF THE CASE

This case involves a fundamental question of due process. Petitioner was a limited partner in two limited partnerships which were engaged in the oil business in Kentucky. At all times mentioned Petitioner was and is a California resident,and Petitioner has never had so called "minimum contacts" with Kentucky on account of the partnership dealings there, or otherwise.

The limited partnerships entered into a contract and security agreement with Respondent's assignor. Both the general partner, and the remaining limited partners, personally guaranteed said contract and security agreement.

Respondent commenced an action in Kentucky, naming as parties defendant the limited partnerships as entities and the general and limited partners individually.

The Kentucky complaint sounded quasi in rem; it is annexed hereto as Appendix F. It prayed for adjudication, under the contract and Security Agreement, that

- "Defendants and each of them are indebted to Plaintiff in the principal sum of . . . ," plus interest (Appendix F, p. 30 at A),

- Plaintiff "is the owner" of the property (Security)(Appendix F, p. 30 at B),

- Defaults existed, and Plaintiff was entitled to remove and sell the property (Security), and apply proceeds against Defendant's indebtedness (Appendix F, pp. 35, 36 at D).

- Defendants and each of them are indebted to Plaintiff for a reasonable "attorney's fee. . . ." (Appendix F, p. 36 at G).

The Kentucky complaint also prayed for:

- "personal judgment in said" (principal and interest) "amounts against each Defendant who is personally served with Summons herein" (emphasis added) (Appendix F, p. 35 at A), and

- "personal judgment in said" (attorney's fee) "amount against all Defendants who are personally served with Summons herein" (emphasis added)(Appendix F, p. 36 at G).

It is an undisputed fact that Petitioner was never personally served with Summons. Obviously, the plain effect of the Prayer is the seeking of personal judgments only against defendants who were personally served with Summons.

Notwithstanding the foregoing limitations the Kentucky court entered its Default Order and Judgment (Appendix D) awarding a "Personal Judgment . . . against Defendants and each of them, jointly and severally." Thus, the Kentucky Court entered a Default Judgment in personam against Petitioner (who was never

personally served with Summons), although the prayer, in two distinct places, sought personal judgment(s) only against Defendants who were "personally served with Summons."

Before issuing its judgment, the Superior Court in and for the County of Los Angeles determined that the Kentucky court had obtained personal jurisdiction over Petitioner, since an attorney who had been hired by the general partner filed a noticed motion which was determined to be a general appearance binding Petitioner according to Kentucky law.

Even supposing that the Kentucky court had personal jurisdiction over Petitioner, the Default Order and Judgment of the Kentucky court entered for failure to file answer cannot properly or validly grant a personal judgment, on default. As above set forth, the prayer expressly does not seek a personal judgment against any defendant who, like Petitioner, was not served with Summons.

Expressed in another way, the defendant is subject only to such a judgment as the complaint demands of him. Any greater or different relief by Default Judgment is unauthorized. The defendant who decides to default is entitled to rely on the specific demands of the Prayer.

This position was presented to the Court of Appeal, highlighted in the Supplement to Appellant's Brief, i.e., December 17, 1971

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court had obtained personal jurisdiction over
Petitioner, since an attorney who had been hired
by the general partner filed a notice of motion
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there binding Petitioner personally to Kentucky
law.

Even supposing that the Kentucky court
had personal jurisdiction over Petitioner, the
Default Order and Judgment of the Kentucky
court entered for failure to file an answer cannot
properly or validly grant a personal judgment
on demand. As above set forth, the prayer
expressly does not seek a personal judgment
against any Defendant who, like Petitioner,
was not served with Summons.

Furthermore, in another way, the default
judgment is void as the
improperly entered. Any pleader or
attorney called to assist Judgment is un-
authorized. The defendant who decides to
default is entitled to rely on the specific demand
of the prayer.

This petition was presented to the
Court of Appeals, Eighth Appellate District, Cuyahoga
County, Ohio, on December 17, 19

letter to the Court of Appeal (Appendix G) and included in the Petition for Hearing to the California Supreme Court.

The Court of Appeal did not in any way consider or deal with this important and fundamental question of due process, in its decision.

The California courts gave full faith and credit to a judgment rendered beyond the Kentucky court's power to exercise its jurisdiction and thereby denied Petitioner due process of law.